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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81 6424

FRANCIS BACIK,

Appellant,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Appellee.

ON APPEAL FROM THE SUPERIOR COURT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

Francis Bacik, Pro Se
42 Spencer Street
Natrona, PA 15065
(412) 224-6881

I. QUESTIONS PRESENTED

A. Whether Ordinance 1187 of Harrison Township, Pennsylvania, is of such overbreadth that it is rendered unconstitutionally vague and violative of the First, Fifth and Fourteenth Amendments to the United States Constitution by virtue of its prohibiting Francis Bacik from simply possessing a partially dismantled automobile anywhere within the confines of the Township.

B. Whether Francis Bacik was denied due process of law and the fundamental right to counsel guaranteed him by the Sixth and Fourteenth Amendments to the United States Constitution when he was denied the right to counsel at his trial before the Magistrate.

C. Whether Francis Bacik was denied his right to an impartial trial by jury as guaranteed him by the Fourteenth Amendment to the United States Constitution when he was required to stand trial on this matter without a jury.

II. PARTIES TO THE PROCEEDING

The parties to this proceeding are the Commonwealth of Pennsylvania and Francis Bacik. There have been no other parties to this proceeding at any time or in any lower court. Francis Bacik has been the Appellant to the Court of Common Pleas of Allegheny County, Pennsylvania, the Commonwealth Court of Pennsylvania, the Supreme Court of Pennsylvania, and this Honorable Court. The Commonwealth of Pennsylvania has been the Appellee at all stages of this proceeding.

TABLE OF CONTENTS

		Page No.
I.	Questions Presented	1
II.	Parties to the Proceeding	2
III.	Table of Contents	3
IV.	Table of Authorities	4
V.	Opinions Below	6
VI.	Jurisdiction	7
VII.	Constitutional References	8
VIII.	Statement of the Case	10
IX.	The Questions are Substantial	13
X.	Conclusion	
XI.	Appendix	
	1. Order of Pennsylvania Supreme Court	A1
	2. Order of Commonwealth Court of Pennsylvania	A2
	3. Opinion of Commonwealth Court of Pennsylvania	A3
	4. Order of Trial Court	A10
	5. Opinion of Trial Court	A12
	6. Notice of Appeal	A14
	7. Ordinance No. 1187	A16
	8. Affidavit of Service	A18

TABLE OF CITATIONS

Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed. 2d 530 (1973). 18

Commonwealth v. Exler, 89 A. 968, 243 Pa. 155 (1941). 14

Commonwealth v. Fisher, 400 A.2d 1284, 485 Pa. 8 (1979). 15

Commonwealth v. Gluck, 381 A.2d 472, 252 Pa. Super. 228 (1977). 14

Commonwealth v. Lee, 234 A.2d 7, 210 Pa. Super. 335 (1967). 21

Commonwealth v. Morrison, 294 A.2d 759, 222 Pa. Super. 304 (1972). 20

Commonwealth v. Ritchey, 245 A.2d 446, 431 Pa. 269 (1968). 20

Commonwealth v. Stanley, 251 A.2d 681, 214 Pa. Super. 118 (1969). 20

Commonwealth ex rel. Goodfellow v. Rundle, 204 A.2d 446, 415 Pa. 528 (1964). 20

Commonwealth ex rel. McCray v. Rundle, 202 A.2d 303, 305, 415 Pa. 65 (1964). 20

Commonwealth ex rel. Mullins v. Maroney, 236 A.2d 781, 428 Pa. 195 (1968). 19

Duncan v. Louisianna, 391 U.S. 145, 20 L.Ed.2d 491, 88 S.Ct. 1444 (1968). 24

Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). 18

Moore v. Michigan, 355 U.S. 155, 78 S.Ct. 191, 2 L.Ed. 2d 167 (1957). 21

Rewis v. United States, 401 U.S. 808, 91 S.Ct. 1056, 28 L.Ed.2d 493 (1971). 14

Sandyford Park Civic Association v. Lunnemann, 152 A.2d 898, 396 Pa. 537 (1959). 14

Von Moltke v. Gilles, 332 U.S. 708, 724, 68 S.Ct. 316, 92 L.Ed. 309 (1948). 22

Williams v. Florida, 399 U.S. 78, 26 L.Ed.2d 446, 90 S.Ct. 1893 (1970). 24

Williams v. United States, 380 F.Supp. 503 (E.D.Pa. 1974). 18

V. OPINIONS BELOW

The unpublished Order of the Supreme Court of Pennsylvania in this matter is set forth in the Appendix herein on Page A1.

The unpublished Opinion and Order of the Commonwealth Court of Pennsylvania in this matter is set forth in the Appendix herein, commencing at Page A2.

The unpublished Memorandum Opinion of the Court of Common Pleas of Allegheny County, Pennsylvania, is set forth in the Appendix herein commencing on Page A12, and the oral Order of Court of the Court of Common Pleas of Allegheny County, Pennsylvania, is set forth in the Appendix herein on Page A11.

VI. JURISDICTION

The judgment of the Supreme Court of Pennsylvania, denying Mr. Bacik's Petition for Allowance of Appeal, thus sustaining his conviction on two counts under the Harrison Township ordinance in question, was entered on December 15, 1981.

A Notice of Appeal to this Court was duly filed in the Supreme Court of Pennsylvania on March 11, 1982. A supplementary Notice of Appeal to this Court was furthermore filed in the Commonwealth Court of Pennsylvania and the Court of Common Pleas of Allegheny County on March 11, 1982. This appeal is being docketed in this Honorable Court within ninety (90) days from the date of judgment below.

The jurisdiction of this Honorable Court is invoked pursuant to the provisions of 28 U.S.C. Section 1257(2). This Honorable Court has held on several occasions that a local ordinance is deemed a state statute for purposes of invoking this Court's jurisdiction under 28 U.S.C. Section 1257(2). Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); King Manufacturing Co. v. City Council of Augusta, 277 U.S. 100 (1928).

VII. CONSTITUTIONAL REFERENCES

1. First Amendment, United States Constitution:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peacibly to assemble, and to petition the Government for redress of grievances."

2. Fifth Amendment, United States Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

3. Sixth Amendment, United States Constitution:

"In all criminal prosecutions, the accused shall enjoy the right to a speedyand public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

4. Section 1, Fourteenth Amendment, United States Constitution:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

5. Section 6, Article 1, Pennsylvania Constitution:

"Trial by jury shall be as heretofore, and the right thereof remain inviolate."

6. Section 9, Article 1, Pennsylvania Constitution:

"In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and, in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty, or property, unless by the judgment of his peers or the law of the land."

7. Ordinance No. 1187, Harrison Township, Pennsylvania (enacted April 10, 1964):

Entire text of Ordinance contained in Appendix hereof, commencing on Page A16.

VIII. STATEMENT OF THE CASE

Francis Bacik is a resident of Harrison Township, Pennsylvania. Mr. Bacik was cited by Harrison Township Police on April 7, 1980, for owning and allowing a disabled vehicle to remain on the Township street in violation of Section II(b) of Harrison Township Ordinance Number 1187. A copy of the aforesaid Township Ordinance appears in the Appendix hereto at A16, A17. On April 11, 1980, Mr. Bacik was cited under Section II(c) of the said Ordinance by a Harrison Township police officer for possessing a dismantled vehicle within Township limits.

Harrison Township Ordinance Number 1187 provides in pertinent part that:

> "ii.(a) On and after the effective date of this Ordinance, no owner or occupant of any property, building, premises, or part thereof, within the Township shall accumulate or suffer to be accumulated upon said property, building or premises any refuse, rubbish or junk as defined in this Ordinance.
>
> (b) No owner of any broken down or partially dismantled automobile shall allow said vehicle to be parked on any public street or alley within the Township."

The aforesaid Ordinance furthermore defines "junk" as being any broken down or dismantled automobile or parts of dismantled automobiles or automotive equipment. Ordinance Number 1187 furthermore provides for a fine of not less than $10.00 and not more than $100.00 and costs of prosecution for each offense, and, in default of payment of such fine and costs, provides for commitment

to the Allegheny County Jail for a period of not less than five (5) nor more than thirty (30) days.

On May 1, 1980, Mr. Bacik appeared before a District Magistrate for hearing on the two citations. Prior to commencement of this hearing, Mr. Bacik advised the Magistrate that he was unable to afford the assistance of counsel but that he desired counsel to represent him in this matter. Mr. Bacik was advised by the Magistrate that he was not entitled to counsel on an Ordinance violation hearing. The hearing thereupon proceeded and Francis Bacik attempted to represent himself. Mr. Bacik was subsequently found to have violated Ordinance Number 1187 on two occasions and fined $100.00 and assessed costs of $26.00 as to each citation.

Francis Bacik thereafter filed an appeal with the Court of Common Pleas of Allegheny County and appeared for trial on July 8, 1980, before a judge of the Court of Common Pleas of Allegheny County, Pennsylvania. Laboring under the belief that he was in fact not entitled to the assistance of counsel in this matter, Mr. Bacik did not renew his request for the appointment of counsel to assist him in his defense.

After hearing in the Court of Common Pleas at a non-jury trial, at which the Commonwealth was represented by an Assistant District Attorney, and at which Mr. Bacik appeared Pro Se, Mr. Bacik was found guilty and the prior sentenced affirmed (Appendix, at A11).

Mr. Bacik then took an appeal to the Commonwealth Court of Pennsylvania raising four issues:

A. Whether he was denied his Constitutional right to the assistance of counsel at the District Court and Common

Pleas levels.

B. Whether Ordinance Number 1187 is of such overbreadth that it is rendered unconstitutionally vague.

C. Whether he was denied his Constitutional right to trial by jury in being required to have his de novo summary conviction heard non-jury.

D. Whether he was entitled to have his appeal heard on the merits in spite of his unwitting failure to preserve his appeal issues for review.

On September 11, 1981, Judge Genevieve Blatt of the Commonwealth Court of Pennsylvania, issued an Opinion granting Mr. Bacik partial relief by considering Mr. Bacik's arguments on their merits, but rejecting his other three requests for relief. A copy of the Opinion and Order of the Commonwealth Court appears in the Appendix herein commencing at Page A3.

Mr. Bacik subsequently filed a timely Petition for Allowance of Appeal with the Supreme Court of Pennsylvania seeking review of the Commonwealth Court Order and arguing that the said Ordinance is of such overbreadth that it is rendered unconstitutionally defective. On December 15, 1981, the Supreme Court of Pennsylvania denied Mr. Bacik's Petition for Allowance of Appeal without opinion (Appendix, A1) and this appeal followed. The Supreme Court of Pennsylvania failed to address any of the questions raised by Mr. Bacik. A Notice of Appeal was filed with the Supreme Court of Pennsylvania on March 11, 1982.

IX. THE QUESTIONS ARE SUBSTANTIAL

A. ORDINANCE 1187 OF HARRISON TOWNSHIP, PENNSYLVANIA, IS OF SUCH OVERBREADTH THAT IT IS RENDERED UNCONSTITUTIONALLY VAGUE AND VIOLATIVE OF THE FIRST, FIFTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION INSOFAR AS IT PROHIBITS FRANCIS BACIK FROM SIMPLY POSSESSING A PARTIALLY DISMANTLED AUTOMOBILE ANYWHERE WITHIN THE CONFINES OF THE TOWNSHIP.

The action of the appellate courts of Pennsylvania, in affirming the judgment of sentence entered by the Court of Common Pleas of Allegheny County, Pennsylvania, was out of harmony with applicable decisions of this Honorable Court and the appellate courts of the Commonwealth of Pennsylvania.

Ordinance Number 1187 constitutes both a penal statute and one which restrains a person in the free enjoyment and use of his personal property. Accordingly, the Commonwealth Court of Pennsylvania was required to strictly construe said ordinance in light of Mr. Bacik's claim of overbreadth.

Ordinance Number 1187 constitutes a penal statute insofar as Pennsylvania Rule of Criminal Procedure 3(k) defines penal laws as including:

> "All statutes and embodiments of the common law which establish, create or define crimes or offenses including any ordinances which may provide for imprisonment upon conviction or upon failure to pay a fine or penalty."

Ordinance Number 1187 indeed provides for imprisonment of from five (5) to thirty (30) days upon failure to pay the fine specified therein. Accordingly, the appellate courts of

the Commonwealth of Pennsylvania were obligated to strictly construe this ordinance to ensure that they do not create offenses which the legislature did not intend to create. In Commonwealth v. Gluck, 381 A.2d 472, 252 Pa. Super. 228 (1977), the Superior Court of Pennsylvania, in construing a provision of the Controlled Substance, Drug, Devise and Cosmetic Act, noted that:

> "Strict construction is a means of ensuring fairness to persons subject to the law by requiring penal statutes to give clear and unequivocal warning in language that people generally would understand, as to what actions would expose them to liability for penalties and what the penalties would be. 3 Souther-land statutory construction 59.03 (4th Ed. 1974) (at A.2d 477)."

Furthermore, the Court in Gluck, citing Rewis v. United States, 401 U.S. 808, 91 S.Ct. 1056, 28 L.Ed. 2d 493 (1971), and Commonwealth v. Exler, 89 A. 968, 243 Pa. 155 (1914), noted that any ambiguity concerning the ambit of a penal statute must be resolved in favor of life and liberty.

Likewise,

> "Building restrictions and similar covenants which restrain a man in the free enjoyment of his property are not favored in the law; they are to be strictly construed and are not to be extended by implication unless the parties clearly so understand and intend (citations omitted)."

Sandyford Park Civic Association v. Lunnemann, 152 A.2d 898, 396 Pa. 537 (1959).

Ordinance Number 1187 is too broad in sweep, since the pertinent provisions of said ordinance prohibit Francis Bacik from possessing a dismantled automobile within Harrison Township,

the place of his residence. Section II(b) prohibits Francis Bacik, or any other individual, from parking a partially dismantled automobile on any public street or alley within the township. Section II(a) prohibits the Petitioner, or any other individual, from simply possessing a partially dismantled automobile and having same on any of his property, buildings, or premises within Harrison Township; this, by virtue of said Ordinance's definition of "junk", which includes all broken down or dismantled automobiles or parts of dismantled automobiles or automotive equipment.

The clear language of the Ordinance thus prohibits Mr. Bacik or any other resident of Harrison Township from repairing his or her automobile unless that automobile remains outside the limits of the Township. This Honorable Court may presume that the drafters of the Ordinance did not intend an unreasonable or absurd result. Commonwealth v. Fisher, 400 A.2d 1284, 485 Pa. 8 (1979).

The Commonwealth Court declined to squarely face this issue, noting simply that Mr. Bacik had not been charged with a violation of Section II(a). The Supreme Court of Pennsylvania has on numerous occasions ruled, however, that where a claim of overbreadth is lodged and colorable claim of impermissable chilling on protected conduct appears:

> "The public's interest in guarding against such infringement is sufficiently important that any Defendant may challenge the constitutionality of the language of the statute as it might be applied to the public at large, notwithstanding that his own actual conduct may not be protected by the First Amendment."

Commonwealth v. Mastrangelo, 414 A.2d 54, ___ Pa. ___ (1980), Commonwealth v. Cook, 361 A.2d 274, 468 Pa. 249 (1976).

Furthermore, the Supreme Court failed to pass upon Mr. Bacik's claim that Section II(c) of Ordinance Number 1187 was constitutionally defective for vagueness. Section II(c) provides, in pertinent part, that: "It shall be unlawful for any person to dump or discard any refuse, rubbish or junk upon any public highway." However, at not time did Mr. Bacik either "dump" or "discard" his vehicle. In fact, at the time of trial the Petitioner was still repairing his automobile and was engaged in repairing said automobile at the time both citations were issued.

The Supreme Court of Pennsylvania itself reiterated the basic dangers inherent in vague legislation in Commonwealth v. Hughes, 364 A.2d 306, 468 Pa. 502 (1976):

> "It is a basic principle of due process that an enactment is void for vagueness, if its prohibitions are not clearly defined. Vague laws offend several important values. ...If arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." (at A.2d 310).

In the instant case the application of Ordinance Number 1187 served to deprive Francis Bacik of the opportunity to repair his automobile. The automobile was not blocking traffic and no testimony was elicited at the time of trial indicating that the Appellant's auto was in any other manner causing a nuisance to the Township.

Application of Sections II(a) and (b) of the Ordinance in this instance operated to deprive Mr. Bacik of the use and enjoyment of his automobile without due process of law in violation of Article I, Section 9, of the Pennsylvania Constitution and the Fourteenth Amendment of the Constitution of the United States. Furthermore, the said ordinance continues to prohibit Mr. Bacik from repairing his automobile within the Township because of its impermissible breadth of application.

Furthermore, Section II(c) is impermissibly vague as applied in this instance insofar as it was applied against Mr. Bacik in spite of the fact that he did not "dump" his automobile in the Township and had no intending to "discard" his automobile.

B. FRANCIS BACIK WAS DENIED DUE PROCESS OF LAW AND THE FUNDAMENTAL RIGHT TO COUNSEL GUARANTEED HIM BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN HE WAS DENIED THE RIGHT TO COUNSEL AT HIS TRIAL BEFORE THE MAGISTRATE.

In the landmark case of Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963), this Honorable Court ruled that an indigent defendant has an absolute fundamental constitutional right to be represented by counsel in a state criminal proceeding where there is a possibility of a substantial jail sentence being imposed. More recently, this Honorable Court furthermore ruled that all petty and minor offenses come within this constitutional mandate where there is a prospect of imprisonment for however short the time. Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed. 2d 530 (1973); Williams v. United States, 380 F.Supp. 503 (E.D.Pa. 1974). The Sixth Amendment to the United States Constitution provides that in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense. Gideon, supra, extended the Sixth Amendment right to counsel to the states through the Fourteenth Amendment and further held that the right includes the right of an indigent to have counsel provided.

The only exception to this constitutional requirement is if the Defendant has "knowingly and intelligently" waived his right to counsel. Argersinger, supra, at U.S. 37.

In the instant case, Ordinance Number 1187 of the Township of Harrison provides that any person convicted of violating its

provisions:

> "Be sentenced to pay a fine of not less than Ten ($10.00) Dollars and not exceeding One Hundred ($100.00) Dollars and costs of prosecution for each and every offense, and, in default of the payment of such fine and costs, to be sentenced and committed to the Allegheny County Jail for a period of not less than five (5) days nor a period of more than thirty (30) days."

The appellate courts of Pennsylvania, in ruling against Mr. Bacik in connection with his claim of right to counsel, ruled in a manner contrary to their own prior decisions and the decisions of this Honorable Court.

On May 1, 1980, Francis Bacik appeared before a District Magistrate for hearing on the two citations charging him with violation of Harrison Township Ordinance Number 1187. At that time, Francis Bacik advised the Magistrate that he was unable to afford counsel and requested that counsel be appointed to represent him in that proceeding. The Magistrate denied Mr. Bacik's request and advised Mr. Bacik that he was not entitled to the assistance of counsel in an ordinance violation case.

In the case of Commonwealth, ex rel. Mullins v. Maroney, 236 A.2d 781, 428 Pa. 195 (1968), the Supreme Court of Pennsylvania ruled that before an effective waiver of the right to counsel can be found:

> "The accused must be fully advised of the extent of his rights in connection therewith. This necessitates that he be informed or know not only of his right to consult with an attorney, but also if he is indigent that a lawyer will be appointed to represent him. In short, he cannot intelligently waive a right of which he is not fully aware." (At A.2d 784).

In fact, the appellate courts of the Commonwealth of Pennsylvania have on numerous occasions ruled that as a matter of law there cannot be a finding of a knowing and intelligent waiver of the right to counsel unless the accused has been explicitly informed that he is entitled to free counsel if he is indigent. Commonwealth v. Ritchey, 245 A.2d 446, 431 Pa. 269 (1968); Commonwealth v. Stanley, 251 A.2d 681, 214 Pa. Super. 118 (1969).

Furthermore, it is settled law in the Commonwealth of Pennsylvania that a waiver of counsel may not be predicated upon absence of counsel, from a failure to request counsel, nor from a silent record. Commonwealth ex rel. Goodfellow v. Rundle, 204 A.2d 446, 415 Pa. 528 (1964); Commonwealth v. Morrison, 294 A.2d 759, 222 Pa. Super. 304 (1972).

In fact, Pennsylvania Rule of Criminal Procedure Number 318 provides that:

> "When a Defendant seeks to waive the right to counsel in a summary case or for a preliminary hearing in a Court case, the issuing authority shall ascertain from the Defendant whether this is a knowing, voluntary and intelligent waiver of counsel. In addition, the waiver shall be in writing, signed by the Defendant and the issuing authority . . . "

In spite of the aforementioned case law and in spite of the provisions of Rule 318, the Magistrate refused to allow Francis Bacik the assistance of counsel at his hearing. On appeal in the Court of Common Pleas, the trial judge failed to establish any intelligent waiver of counsel from Francis Bacik. Mr. Bacik defended himself as best he could under the circumstances, believing that he was not entitled to the assistance of counsel in

this case and unable to afford trial counsel. The appellate courts of the Commonwealth of Pennsylvania have on numerous occasions ruled that where the record is barren on the issue of waiver of counsel, the burden is on the Commonwealth to show any such waiver. Commonwealth ex rel. Johnson v. Maroney, supra, Commonwealth v. Lee, 234 A.2d 7, 210 Pa. Super. 335 (1967).

The finding of a waiver of counsel may not be made lightly, Moore v. Michigan, 355 U.S. 155, 78 S.Ct. 191, 2 L.Ed. 2d 167 (1957), and both Magistrate and Judge had an obligation under the circumstances to advise Mr. Bacik as to his right to counsel and to ascertain whether he desired to waive said right.

Comment A to the Pennsylvania Rule of Criminal Procedure Number 318 sets forth the minimum questions the Magistrate was required to ask of Mr. Bacik in order to establish a valid waiver of counsel: (1) That the Defendant understands that he has the right to be represented by counsel, and the right to have free counsel appointed if he is indigent. (2) That the Defendant understands the nature of the charges against him and the elements of each of those charges. (3) That the Defendant is aware of the permissable range of sentences and/or fines for the offenses charged. (4) That the Defendant understands that if he waives the right to counsel he will still be bound by all the normal rules of procedure and that counsel would be familiar with these rules. (5) That the Defendant understands that there are possible defenses to these charges which counsel might be aware of, and that if these defenses are not raised at trial, they may be lost permanently. (6) That the Defendant understands that, in addition

to defenses, the Defendant has many rights that, if not timely asserted, may be lost permanently; and that if errors occur in and are not timely objected to, or otherwise timely raised by the Defendant, these errors may be lost permanently. The Magistrate in this case not only failed to advise Mr. Bacik as to the aforementioned rights, but furthermore compounded his error by informing Mr. Bacik that he was in fact not entitled to the assistance of counsel. The Magistrate took no initiative to continue the case in order that Mr. Bacik might secure counsel.

Additionally, the learned trial judge presiding at Mr. Bacik's appeal hearing had an obligation to determine whether or not a waiver of counsel was made:

> "With an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances . . . ." Von Moltke v. Gilles, 332 U.S. 708, 724, 68 S.Ct. 316, 92 L.Ed. 309 (1948); Commonwealth ex rel. McCray v. Rundle, 202 A.2d 303, 305, 415 Pa. 65 (1964).

Although Mr. Bacik proceeded Pro Se at his appeal hearing because he believed that he was not entitled to the assistance of counsel, the United States Supreme Court has ruled on several occasions that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend upon a request. Kitchens v. Smith, 401 U.S. 847, 91 S.Ct. 1089, 28 L.Ed. 2d 519 (1971); Carnley v. Cochran, 369 U.S. 506, 82 S.Ct.

884, 8 L.Ed. 2d 70 (1962).

Furthermore, as this Honorable Court noted in Argersinger, supra:

> "The Sixth Amendment . . . extended the right to counsel beyond its common-law dimensions. But there is nothing in the language of the Amendment, its history, or in the decisions of this Court, to indicate that it was intended to embody a retraction of the right in petty offenses wherein the common law previously did require that counsel be provided (at U.S. 30)."

Although this Honorable Court in Argersinger, expressly reserved the question as to whether the requirements of the Sixth Amendment pertaining to the right of counsel apply where the Defendant is not in fact sentenced to jail (at U.S. 37), it is respectfully submitted that all principles enunciated in Gideon and Argersinger apply here, where, a jail sentence is provided for if the fine and costs have not been paid. Neither the fine nor costs have been paid by Mr. Bacik to date. Furthermore, the failure to afford Mr. Bacik his constitutional right to counsel and thus a reasonable opportunity to defend himself against the charges amounted to a denial of due process of law. In re Oliver, 333 U.S. 257 (1948).

C. FRANCIS BACIK WAS DENIED HIS RIGHT TO AN IMPARTIAL TRIAL BY JURY AS GUARANTEED HIM BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I OF THE PENNSYLVANIA CONSTITUTION WHEN HE WAS REQUIRED TO STAND TRIAL ON THIS MATTER WITHOUT A JURY.

The Sixth Amendment to the United States Constitution provides that:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Furthermore, Section 9, Article I, of the Pennsylvania Constitution provides quite clearly that:

> "In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and, in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty, or property, unless by the judgment of his peers or the law of the land."

The right to a trial by jury is a fundamental right essential for assuring that all Defendants are provided with fair trials. Williams v. Florida, 399 U.S. 78, 26 L.Ed. 2d 446, 90 S.Ct. 1893 (1970); Duncan v. Louisianna, 391 U.S. 145, 20 L.Ed. 2d 491, 88 S.Ct. 1444 (1968).

The Supreme Court of Pennsylvania, in fact, in Commonwealth v. Harmon, 366 A.2d 895, 469 Pa. 490 (1976), considered the municipal court system of the City of Philadelphia, in which:

> The Defendant shall have no right of trial by jury in that (Municipal) court, but he shall have the right of an appeal for trial de novo including the right to trial by jury to the trial division of the Court of Common Pleas. (Citing Article V, Section 16(r)(iii) of the Pennsylvania Constitution, at A.2d 987).

The Supreme Court noted in Harmon that the second proceeding referred to in the above cite is "necessarily mandated" by Article 1, Section 9 of the Consititution of this Commonwealth. Likewise, the Sixth Amendment to the Constitution of the United States guarantees an accused the right to counsel "in all criminal prosecution." Accordingly, the Appellant is entitled to trial by jury in connection with his ordinance violation.

X. CONCLUSION

WHEREFORE, Francis Bacik respectfully requests that this Honorable Court consider his appeal on its merits, allow the filing of briefs or oral argument thereon, vacate the Order of the Supreme Court of Pennsylvania, declare the Ordinance at issue null and void, and discharge him.

In the alternative, Francis Bacik respectfully requests that this Honorable Court grant him a new trial in the Court of Common Pleas with Court-appointed or other counsel or such other relief as this Honorable Court may deem fitting and proper.

Respectfully submitted,

Francis Bacik

Francis Bacik, Pro Se

The Supreme Court of Pennsylvania
Western District

CARL RICE, ESQ
PROTHONOTARY
IRMA T. GARDNER
DEPUTY PROTHONOTARY

801 CITY-COUNTY BUILDING
PITTSBURGH, PA
15219

December 21, 1981

Mr. Francis Bacik
42 Spencer Street
Natrono, Pa. 15065

In Re: Commonwealth vs. Bacik
No. 312 W. D. Misc. Docket 1981

Dear Mr. Bacik:

This is to advise you that your Petition for Allowance of Appeal in the above-captioned matter was denied by the Court on December 15, 1981.

Very truly yours,

Carl Rice

PROTHONOTARY

CR:erv
cc: Robert L. Eberhardt, Esquire
Deputy District Attorney
401 Court House
Pittsburgh, Pa. 15219

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

FRANCIS BACIK,	:	
	:	
Appellant	:	
	:	
v.	:	NO. 1931 C. D. 1980
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
Appellee	:	

O R D E R

AND, NOW, this 11th day of September , 1981, the judgment of sentence of the Court of Common Pleas of Allegheny County in the above-captioned matter is affirmed.

Genevieve Blatt, Judge

CERTIFIED FROM THE RECORD

SEP 11 1981

Francis C. Barbush
CHIEF CLERK

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

FRANCIS BACIK,	:	
	:	
Appellant	:	
	:	
v.	:	NO. 1931 C. D. 1980
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
Appellee	:	

BEFORE:

HONORABLE GENEVIEVE BLATT, Judge
HONORABLE DAVID W. CRAIG, Judge
HONORABLE JOHN A. MacPHAIL, Judge

ARGUED: May 4, 1981

O P I N I O N

OPINION BY JUDGE BLATT FILED: September 11, 1981

Francis Bacik (appellant) appeals from a decision of the Court of Common Pleas of Allegheny County which adjudged him guilty of two violations of Harrison Township Ordinance Number 1187 (Ordinance 1187) and imposed a fine and costs.

On April 2, 1980 the appellant was warned by a Harrison Township police officer that parking his partially dismantled vehicle on a public street or alley was a violation of a township ordinance. The appellant's car, from which the engine had been removed, was at that time parked on the street in front of his residence. He informed the police officer that he would have the car back together and operative within 72 hours, at which time he would remove it. Five days later, however, when the vehicle with its motor still partially dismantled and still undergoing repairs continued to be parked at the same location, a citation was issued to the appellant for violation of Section II(b) of Ordinance 1187. Four days after that, April 11, 1980, a second citation was issued for violation of Section II(c) of the same ordinance. At his May 1, 1980 appearance before the district magistrate, the appellant indicated that he desired the assistance of counsel, but was unable to afford it, and he was informed by the magistrate that he was not entitled to counsel in an ordinance violation case. After a hearing, he was then found guilty of violating Ordinance 1187 on two occasions and was fined $100.00 plus $26.00 in costs for each violation. He appealed to the Court of Common Pleas of Allegheny County and had a

trial de novo at which he once more represented himself. He was again found guilty of both violations with identical fines and costs imposed. This appeal followed.

Section II of the Township Ordinance 1187 provides in pertinent part that:

> (b) No owner of any broken down or partially dismantled automobile shall allow such vehicle to be parked on any public street or alley within the Township.
>
> (c) It shall be unlawful for any person to dump or discard any refuse, rubbish or junk upon any public highway, street or alley . . . in said Township.

Section I(c) of the ordinance defines "junk" as including, inter alia, "all broken down or dismantled automobiles or parts of dismantled automobiles or automotive equipment . . . ." The ordinance provides for imposition of a fine of not less that $10.00 nor more than $100.00 plus costs of prosecution upon conviction of each offense and, upon default of payment, that the offender shall "be sentenced and committed to the Allegheny County Jail for a period of not less than five (5) days nor a period of more than thirty (30) days."

The appellant, relying on Argersinger v. Hamlin, 407 U. S. 25 (1972), maintains that he was denied his state and federal constitutionally guaranteed right[1] to the assistance of counsel at both the district court and the common pleas court levels, and asserts that as a result, he failed to present his case properly and to preserve issues for appellate review.

In Argersinger v. Hamlin, supra at 37, the United States Supreme Court held that the federal constitution required that, "absent a knowing and intelligent waiver, no person may be imprisoned for any offense whether classified as petty, misdemeanor, or felony,

unless he was represented by counsel at his trial." (Emphasis added.)

The Court went on to say:

> Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel. . . .
>
> The run of misdemeanors will not be affected by today's ruling. But in those that end up in the actual deprivation of a person's liberty, the accused will receive the benefit of "the guiding hand of counsel" so necessary when one's liberty is in jeopardy. (Emphasis added.)

Argersinger v. Hamlin, supra at 40.

Subsection (a) of Pa. R. Crim. P. 316, designed to implement the decision of Argersinger v. Hamlin, supra,[2] provides that:

> Counsel shall be assigned in all summary cases to all defendants who are without financial resources or who are otherwise unable to employ counsel when there is a likelihood that imprisonment will be imposed (Emphasis added.)

The Comment following the Rule indicates that Pa. R. Crim. P. 316(a) requires the assignment of trial counsel to indigent defendants upon a determination by the issuing authority that it is likely that a defendant will be sentenced to imprisonment upon a finding of guilt. This theme is reiterated in the Comment following Pa. R. Crim. P. 63 which, in analyzing that rule's provision that "[t]he defendant shall be advised of his right to retain counsel," notes that "[t]he defendant has a right to counsel at trial in all summary cases in which the issuing authority determines that there is a likelihood of imprisonment. See Rule 316." (Emphasis added.)

The only sentence provided by the ordinance in question here is a fine and costs; only upon default of payment of the penalty and attendant costs does the possibility of imprisonment arise, and upon the occurrence of such default, the ordinance requires that the de-

fendant then be sentenced and committed to the county jail. Moreover, Pa. R. Crim. P. 65(a) provides that:

> If a defendant, sentenced to pay a fine or costs after a finding of guilt in a summary case, defaults in such payments, the issuing authority shall not commit the defendant to prison for failure to pay a fine or costs unless, after hearing, it appears that the defendant is financially able to pay the fine or costs.

It is clear, therefore, that the possibility of a sentence of imprisonment only comes into play upon a determination of default in a second and subsequent hearing and is never a consideration in the original sentencing procedure. Furthermore, it is evident that Pa. R. Crim. P. 65 precludes the possibility of imprisonment ever being imposed upon one whose indigency is established. The appellant cannot prevail, therefore, in his assertion of a right to representation by appointed counsel for this ordinance violation

The appellant further argues that the language of Ordinance 1187 is overbroad and unconstitutionally vague, alleging that the combined effect of Sections II (a) and (b) of the ordinance is effectively to eliminate the non-commercial repair of automobiles within the township. As we read this ordinance, however, township owners and occupants are prohibited under Section II(b) from parking a disabled or partially disabled vehicle on a public street or alley and, under Section II(a) from accumulating junk, as defined in the ordinance, on property, buildings or premises within the township; it, however, is not of concern here, for the appellant was charged with violation of Sections II (b) and (c) and not with violation of Section II(a). Section II(b), under which the appellant was charged, moreover, articulates a specific and appropriate exercise of the police power by the township in controlling and preventing the accumulation of refuse,

rubbish and junk upon its streets and cannot be described as suffering from either overbreadth or vagueness.

The appellant asserts finally that he was denied the right to trial by jury at his trial de novo guaranteed him by Article I, Section 6 of the Pennsylvania Constitution.[3] It is well-settled, however, that no right to a jury trial exists at such trials when a sentence of six months or less is imposed. Baldwin v. New York, 399 U. S. 66 (1970); In re Martorano, 464 Pa. 66, 346 A.2d 22 (1975); Commonwealth v. Mayberry, 459 Pa. 91, 327 A.2d 86 (1974). In the instant case imprisonment was not, and could not have been, imposed at the trial de novo, under the provisions of the ordinance, and the only sentence mandated by the ordinance was a fine and costs. Only upon a subsequent default in payment of the penalty by the appellant did the possibility, after a hearing, of a sentence of imprisonment arise, and, in the case of an indigent, imposition of such a sentence would be foreclosed. Pa. R. Crim. P. 65(a). The right to trial by jury preserved by the Pennsylvania Constitution is the right as it existed when such provision was first written into the state Constitution and does not apply to a summary proceeding for an ordinance violation. See Scranton v. Hollenberg, 152 Pa. Superior Ct. 138, 31 A.2d 437 (1943); Oley Township v. Hauseman, 61 Berks 58 (1968).

For the foregoing reasons, therefore, we must affirm the decision of the court below.

Genovieve Blatt, Judge

FOOTNOTES

[1] U. S. Const. amend. VI; Pa. Const. art. I, §9.

[2] See Comment following Pa. R. Crim. P. 316.

[3] The appellant also relies, improperly, upon Commonwealth v. Harmon, 469 Pa. 490, 366 A.2d 895 (1976), which deals with the guarantee afforded by Article V, Section 16(r)(iii) of the Pennsylvania Constitution, Pa. Const. art. V, §16(r)(iii), of the right to trial by jury in a trial de novo in the court of common pleas upon appeal from the Philadelphia Municipal Court. Section 16 of Article V is restricted to the judicial system within the city of Philadelphia and does not apply to a case being tried in Allegheny County. Section 17 of Article V which deals with judicial matters pertaining to Allegheny County, does not contain a similar provision.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,
Plaintiff,

vs.

FRANCIS BACIK,
Defendant.

STATUTORY APPEALS DIVISION

No. SA 555-80

Trial Transcript

Filed By:
George R. Bernick,
Official Court Reporter

Trial Date:
July 8, 1980

Trial Judge:
Hon. Silvestri Silvestri

COUNSEL OF RECORD:

For the Commonwealth:
Joseph Sabadish, Esq.
Assistant District Attorney

For the Defendant:
(Not Represented by Counsel)

- - - - - - -

the street?

MR. BACIK: Your Honor, I don't have the money. I need a tow truck.

THE COURT: You just told the District Attorney that all four wheels are on it, you could push it.

MR. BACIK: Yes, sir.

THE COURT: Don't you have a back yard, a side yard, a front yard?

MR. BACIK: Your Honor, we have a garden.

THE COURT: A what?

MR. BACIK: A garden. With the cost of living, your Honor, that garden is more important to me than anything. I get good vegetation.

THE COURT: So are the rules and regulations of society and so are the rules and regulations of municipalities. You are guilty.

(Hearing concluded.)

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	CIVIL DIVISION
	:	
	:	No. SA 555 of 1980
v.	:	
	:	Code
FRANCIS BACIK,	:	
	:	
Defendant.	:	MEMORANDUM OPINION

Filed by
Honorable Silvestri Silvestri
Judge

MEMORANDUM OPINION

SILVESTRI, J.

None of the matters raised in defendant's statement of the matters complained of in his appeal were raised by the defendant in the hearing before the trial court.

Dated 12 day of April, 1980.

THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

FILED

MAR 11 [illegible]

SUPREME COURT
WESTERN DISTRICT

FRANCIS BACIK, Appellant, v. COMMONWEALTH OF PENNSYLVANIA, Appellee.	No. 312 W.D. Misc. Docket 1981

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Francis Bacik, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final Order of the Supreme Court of Pennsylvania denying his Petition for Allowance of Appeal in this matter dated December 15, 1981.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

Francis Bacik

Francis Bacik, Pro Se
42 Spencer Street
Natrona, PA 15065
(412) 224-6881

THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

FRANCIS BACIK, Appellant, vs. COMMONWEALTH OF PENNSYLVANIA, Appellee.	)	No. 312 W.D. Misc. Docket 1981

PROOF OF SERVICE

I, Francis Bacik, hereby certify that I have served a true and correct copy of this Notice of Appeal upon the following parties by depositing a true and correct copy thereof in a United States mailbox with first-class postage prepaid, on this 11 day of March, 1982, which service satisfies Supreme Court Rule Number 28:

Robert L. Eberhardt, Esq.
Deputy District Attorney
401 Courthouse
Pittsburgh, PA 15219

Office of the Prothonotary
Commonwealth Court of Pennsylvania
6th Floor, South Office Building
Harrisburg, PA 17120

Office of the Prothonotary
Court of Common Pleas of Allegheny County
City-County Building
Pittsburgh, PA 15219

Date: 11 March 1982

Francis Bacik, Pro Se

ORDINANCE NO. 1187

AN ORDINANCE OF THE TOWNSHIP OF HARRISON, ALLEGHENY COUNTY, PENNSYLVANIA, REGULATING AND RESTRICTING THE ACCUMULATION OF REFUSE, RUBBISH AND JUNK UPON PUBLIC OR PRIVATE PROPERTY WITHIN SAID TOWNSHIP, AND PROVIDING PENALTIES FOR VIOLATIONS THEREOF.

BE IT ORDAINED AND ENACTED by the Board of Commissioners of the Township of Harrison, and it is hereby ordained and enacted by authority of the same:

SECTION I. Definitions: For the purposes of this Ordinance, words used in the present tense includes the future, words in the singular includes the plural number and vice versa, the word shall is mandatory and the following words are intended to have the meaning hereinafter attributed to them, viz:

(a) Refuse - - - All cans, cartons and containers which were receptacles for food or were receptacles for materials normally used in and about the enjoyment of human habitation, but specifically shall not include ashes, yard clippings, discarded furniture, machinery, parts of dismantled automobiles or equipment or any accumulation of containers or waste resulting from any commercial or industrial operation.

(b) Rubbish - - - All non-putrescible solid wastes which are not hereinabove classified as refuse, whether combustible or non-combustible, such as ashes, yard clippings, newspapers, magazines, discarded furniture and bedding.

(c) Junk - - - All broken down or dismantled automobiles or parts of dismantled automobiles or automotive equipment, other dismantled machinery, any accumulation of containers or wastes resulting from any commercial or industrial operation and any and all other materials commonly denoted as "junk".

(a) On and after the effective date of this Ordinance, no owner or occupant of any property, building, premises, or part thereof, within the Township shall accumulate or suffer to be accumulated upon said property, building or premises any refuse, rubbish or junk as defined in this Ordinance.

(b) No owner of any broken down or partially dismantled automobile shall allow said vehicle to be parked on any public street or alley within the Township.

(c) It shall be unlawful for any person to dump or discard any refuse, rubbish or junk upon any public highway, street or alley or upon any public easement or in any public sewer in said Township.

SECTION III.

(a) Any individual person, or officer, agent, servant or employee of any firm, partnership or corporation who violates or causes to be violated any of the provisions of this Ordinance shall, upon conviction before any Justice of the Peace of the Township of Harrison, be sentenced to pay a fine of not less than Ten ($10.00) Dollars and not exceeding One Hundred ($100.00) Dollars and costs of prosecution for each and every offense, and, in default of the payment of such fine and costs to be sentenced and committed to the Allegheny County Jail for a period of not less than five (5) days nor a period of more than thirty (30) days.

(b) Each and every day that a violation of this Ordinance is permitted to continue twenty-four (24) hours after receiving notice of said violation from the office of the Township Secretary or from the Township Building Inspector shall be construed to constitute another separate and distinct offense under this Ordinance and shall be subject to separate and distinct penalties thereon.

SECTION IV. Any Ordinance or part of any Ordinance conflicting with the provisions of this Ordinance be and the same is hereby repealed insofar as the same may conflict with the provisions of this Ordinance.

ORDAINED and ENACTED into a law this 10th day of April, 1964.

TOWNSHIP OF HARRISON

By Alvin E. Mason, Jr.
Alvin E. Mason, Jr., President

ATTEST:

Chester J. Grove
C. A. Grove, Secretary

RECEIVED
MAR 17 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

AFFIDAVIT OF SERVICE

COMMONWEALTH OF PENNSYLVANIA)
) SS:
COUNTY OF ALLEGHENY)

Before me, the undersigned authority, a Notary Public in and for said County and State, personally appeared Francis Bacik, who, being duly sworn according to law, deposes and says that he served three true and correct copies of the Jurisdictional Statement and Appendix upon Appellee, Robert L. Eberhardt, Esquire, Deputy District Attorney, 401 Courthouse, Pittsburgh, Pennsylvania, 15219 by depositing an envelope containing same in a United States Mailbox with first class postage prepaid, and properly addressed to said Appellee, at approximately 5:00 o'clock, P .M., on the 13th day of March, 1982.

Francis Bacik, Pro Se

SWORN TO AND SUBSCRIBED
before me this 13th day
of March, 1982.

Cynthia M. Madison
NOTARY PUBLIC